(14)

No. 84-701

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

RIVERSIDE BAYVIEW HOMES, INC., et al.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Whether low-lying, poorly-drained land owned by Riverside, hydrologically unrelated to any lake, river, or stream, is a "navigable water" within the meaning of section 502(7) of the Clean Water Act, codified at 33 U.S.C. § 1362(7), thereby subjecting the placement of fill on that land to U.S. Army Corps of Engineers regulatory jurisdiction.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Allied Aggregate Transportation Company is a respondent in this case. Allied has no interest in the case separate from that of Riverside Bayview Homes, Inc.

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STATEMENT

1. Riverside Bayview Homes, Inc. (hereafter "Riverside") confronts in this case the worst of the regulatory excesses of the U.S. Army Corps of Engineers (hereafter "Corps") in its administration of the Clean Water Act of 1972, 33 U.S.C. section 1251, et seq. (hereafter "CWA").[1] The precise issue is whether the CWA, an act that by its terms is limited to controlling the

[1] The Federal Water Pollution Control Act was substantially amended in 1972. 33 U.S.C. § 1251, et seq. The 1972 amendments established the present format of the act. Additional amendments occurred in 1977, but did not alter the jurisdictional reach of the CWA. The popular name of the act was also changed in 1977 to the "Clean Water Act." We shall refer to both the 1972 and 1977 versions under its present common name—the Clean Water Act ("CWA").

discharge of pollutants into "navigable waters,"[2] authorizes the Corps, under section 404 of the act, 33 U.S.C. section 1344, to control the use of land that, although wet, is not a part of or influenced by any waterbody.[3] The court of appeals correctly held that the Corps' assertion of jurisdiction over land owned by Riverside, on the basis that it is a "navigable water," was unauthorized by either the CWA or the Corps' own regulations because the property is not a part of or connected to any waterbody. Pet. App. 10-12a.[4]

The government urges reversal of the court of appeals on the ground that Riverside's lands are "wetlands" and are to be included within the jurisdictional reach of the CWA as "navigable waters" within the meaning of 33 U.S.C. section 1362(7). In asserting jurisdiction under the CWA over "wetlands," the government fails to recognize that "wetlands" occupy a wide spectrum of land conditions, ranging from permanently submerged marshes that are a part of a waterbody to low-lying inland areas possessing poor drainage that become seasonally wet only during periods of high precipitation.[5] By its claim, the government effectively asserts jurisdiction over millions of acres of lands

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[2] The CWA defines "navigable waters" as "waters of the United States, including the territorial seas." CWA § 502(7), 33 U.S.C. § 1362(7).

[3] Although principal regulatory authority under the CWA rests in the Environmental Protection Agency, the regulation of the placement of dredged or fill materials in "navigable waters" is vested in the Corps under section 404 of the act.

[4] Appendix to United States Petition for Writ of Certiorari (hereafter "Pet. App.").

[5] *See* Office of Technology Assessment, Congress of the United States, *Wetlands, Their Use and Regulation*, Doc. No. OTA-9-206 at 28, 87-92 (1984) (hereafter *OTA Wetlands*); Fish and Wildlife Service, U.S. Dept. of Interior, *Classification of Wetlands and Deepwater Habitats of the United States* at 3 (1979) (hereafter *Classification of Wetlands*); Fish and Wildlife Service, U.S. Dept. of Interior, *Wetlands of the United States: Current Status and Recent Trends* at 28-29 (1984) (hereafter *National Wetlands Inventory*); Fish and Wildlife Service,

throughout the United States that, like the property owned by Riverside, possess poor drainage or a high groundwater table but are hydrologically unrelated to any body of water.[6]

The court of appeals found such a construction of the CWA and the Corps' regulations unreasonable and unsupported by the language of the act. In so doing, that court concluded that the CWA was not intended by Congress to regulate land areas that are not a part of or frequently inundated by a "navigable water." In this regard, the court's decision properly distinguishes between those areas that are a part of "navigable waters" and those that are not related to a waterbody of any sort.

2. In 1952, George Short began to purchase lots in Harrison Township, Michigan, a suburb northeast of Detroit, for the purpose of consolidating the area for one development. Over time, Mr. Short acquired a total of 80 acres. In 1960, when more investment was needed, the Riverside Corporation was formed (deriving its name from the platted subdivision in which the properties are located—"Riverside Bay Gardens"), and the property was transferred to that entity as its sole asset. 6th Cir. App. 126-127.[7]

The land lies approximately one mile west of Lake St. Clair and south of South River Road, a raised roadbed that roughly parallels the Clinton River to the north. Pet. App. 2a. A number of housing subdivisions are located between Riverside's property and Lake St. Clair. Pet. App. 35a. The western boundary of the property is formed by Jefferson Avenue, a heavily travelled thoroughfare separating the land from urbanized areas to the west. Between the southern boundary of the property and the man-made Savan Drain are two privately owned 10-acre parcels.

U.S. Dept. of Interior, *Wetlands of the United States*, Circular 39 at 14-17 (1971) (hereafter *Circular 39*).

[6] *See generally Classification of Wetlands; National Wetlands Inventory; Circular 39;* U.S. Army Corps of Engineers, Dept. of the Army, *Wetlands Delineation Manual*, Doc. No. Y-84- (1985 Draft) (hereafter *Wetlands Delineation Manual*).

[7] Appendix submitted to the Sixth Circuit Court of Appeals by the United States (hereafter "6th Cir. App.")

Pet. App. 2a. To the south of the Savan Drain is the Metropolitan Parkway and a large development known as Metropolitan Beach which was constructed through extensive dredging and filling. Riverside App. 8a-10a;[8] Exh. 55. The property is ringed on all four sides by paved public streets and fully developed urban areas. Pet. App. 2a-3a, 19a; Exh. 22, 55; 6th Cir. App. 76.

From the early 1900s until at least 1955, the Riverside land, together with much of the surrounding area, was actively farmed. 6th Cir. App. 166-167; Exh. 25, 26, 27. Those portions of the land on which crops were not grown were heavily wooded by oak and maple trees that are still in existence today. Riverside App. 3a-7a. The Lamson soil that underlies the property possesses a high seasonal water table, drains poorly, and has limited permeability. Riverside App. 11a-13a; J.A. 21.[9] Soil conditions of this type are typical of this part of Michigan.

The Riverside land consists of a 60-acre parcel and an adjoining 20-acre parcel located to the north and east. Pet. App. 22a. The 60-acre parcel was originally platted as the "Riverside Bayview Gardens" subdvision in 1916 under a Michigan statute requiring a finding that the property was suitable for residential development. Pet. App. 22a; Exh. 24; Mich. Comp. Laws Ann. 3350.1 (1915). Development of the property commenced in 1916 with the paving of sidewalks. Pet. App. 22a. A 1929 map of the area shows that no portion of the property displayed "wetland" characteristics at that time. Exh. 21.

With the acquisition of the land by George Short in the 1950s, the development of the subdivision continued. In the 1950s and 1970s, sewer lines and fire hydrants were installed. Riverside App. 1a-2a; J.A. 84-85. The anticipated development of the land was also factored into the design of the sewer trunk lines serving the area. 6th Cir. App. 187. Two obstacles hindered full implementation of Riverside's development plans. First, objections from an

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[8] Portions of the trial transcript referred to herein are included in an appendix to this brief and hereafter referred to as "Riverside App."

[9] Joint Appendix on Writ of Certiorari to the Sixth Circuit Court of Appeals (hereafter "J.A.").

adjoining property owner prevented an existing road that bisected the 60-acre tract from being formally vacated. Second, a local governmental agency imposed minimum lot elevations that required filling of the site. This fill did not become available until 1976. Pet. App. 3a; 6th Cir. App. 129-130.

In 1973, Lake St. Clair rose to levels unprecedented since water-stage data was first recorded in 1897. Pet. App. 29a. Homes and businesses near Riverside's property were flooded for the only time in memory. Pet. App. 30a. The Corps, in concert with various local agencies, took emergency action to prevent further flooding. One of the flood control measures was the Corps' construction of a large dike designed to protect surrounding lands from inundation. Despite objections from Riverside, the Corps refused to place the dike in a location that would also protect Riverside's property. 6th Cir. App. 133. In fact, the dike's location, together with the other preventative measures, impeded the property's natural drainage and directed surface water from neighboring areas onto Riverside's land.[10] Pet. App. 3a; J.A. 97, 100-101; 6th Cir. App. 177-180. Although the lake waters receded, the flood control measures were left intact and have had the continuing effect of diverting drainage water onto the property and altering the land's ability to drain.[11] Pet. App. 3a.

When a source of fill became available in September 1976, Riverside undertook discussions with the Corps to determine

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[10] A drainage ditch along Jefferson Avenue, designed to divert surface runoff from subdivisions to the west, was filled in, directing the runoff onto the Riverside property. In a similar fashion, a pumping station was constructed southwest of Riverside's land for the purpose of lifting water from the west side of Jefferson Ave. to the Savan Drain south of the Riverside land. This water did not simply confine itself to the drain, but spread across the Riverside property. As a part of its program, the Corps constructed what is known as the "Operation Foresight" dike through Riverside's land. A pump installed on the dike by the Corps pumped yet more water onto Riverside's land. 6th Cir. App. 177-178.

[11] The only effort to return Riveride's property to its former condition was to breach the dike in one place. 6th Cir. App. 179-180.

whether a permit was required under regulations recently promulgated by that agency. Pet. App. 3a; 6th Cir. App. 146-147, 158. Those regulations were the "interim final regulations," published on July 25, 1975, in which the Corps defined "navigable waters" subject to fill permit requirements to include "freshwater wetlands including marshes, shallows, swamps and similar areas that are *contiguous* or *adjacent* to other navigable waters and that support freshwater vegetation." 40 Fed. Reg. 31324 (1975) (emphasis added). "Freshwater wetlands" in turn were defined as:

> Those areas that are *periodically inundated* and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction . . . .

40 Fed. Reg. 31324-31325 (1975) (codified at 33 C.F.R. § 209.120[d][2][h]) (emphasis added). With the exception of a portion of Riverside's land along the north boundary designated as being clear of Corps jurisdiction, uncertainty and confusion existed as to what area the Corps claimed was subject to its permit requirements. 6th Cir. App. 154-158, 162. Nonetheless, Riverside filed a permit application on November 15, 1976. Pet. App. 3a.

Riverside also sought and obtained a fill permit from Harrison Township. When, by December 1976, Riverside had not commenced filling, the township formally notified the company that its land constituted a nuisance under the terms of the applicable local zoning ordinance and that, unless Riverside filled the property, it stood to sustain substantial fines. J.A. 87-88. Filling commenced immediately.

3. The Corps instituted enforcement proceedings against Riverside on December 22, 1976, through issuance of a cease and desist order prohibiting further filling of the site. Pet. App. 4a. When filling continued, the Corps brought this enforcement proceeding on January 7, 1977. Pet. App. 4a. As of that date, the only investigation conducted by the Corps was a quick fly-by in an airplane and a five-minute visit to the site by one botanist who took no samples and could not identify any particular plant species observed while at the site. J.A. 29-30.

The government immediately sought a preliminary injunction. A hearing on that motion proceeded in January 1977 under the July 25, 1975 Corps regulations. Pet. App. 22a. The district court (Judge Cornelia G. Kennedy) found that the property in its present condition was characterized by a prevalence of vegetation that required saturated soil conditions for growth and reproduction, but that the reason for the prevalence of this wetland-type vegetation was the poor drainage characteristics of the Lamson soil that underlay the property, and not the land's proximity to any waterbody.[12] Pet. App. 23a-25a. The judge concluded that the evidence established that there was no hydrologic connection between the property and any nearby waterbody.[13] Pet. App. 25a.

Since the 1975 Corps regulations required a finding of "periodic inundation," Judge Kennedy focused on that element. She found that the property had been inundated (i.e. flooded) four to six times in the last 80 years during periods of extreme high water on Lake St. Clair, the most recent occurring during the unprecedented high waters of 1973-74.[14] Judge Kennedy admittedly struggled with the meaning of "periodic" as used in the regulations. The government claimed that the requirement of "periodic inundation" was related to the purported necessity of preserving wetland areas. Judge Kennedy pointed out, however, that if the

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[12] The evidence established that the Lamson soil was such that water from any adjoining lake, river, or canal could not permeate the soil beyond a 50- to 100-foot distance. These conclusions are supported by the United States Department of Agriculture 1971 Soil Survey of Macomb County, Michigan, Exh. 28, and the testimony of the author of that report, Thomas P. Gough. Pet. App. 34a.

[13] Curiously, Judge Kennedy concluded that the land was "contiguous" (as that term is used in the regulations) to Black Creek. However, Black Creek is nowhere near the property, being located far to the east. Exh. 55. While the Savan Drain ultimately flows into the creek, their confluence is some distance away. The Savan Drain, moreover, at its closest point, is located approximately 200 feet southeast of the Riverside property. Pet. App. 23a-24a; Exh. 24.

[14] Other high water occurrences were 1928, 1952-53 and 1969. Pet. App. 30a. Judge Kennedy equated the term "inundated" with "flooding." Pet. App. 26a.

government were correct in viewing the CWA as a wetland preservation device, the regulations also would have prohibited draining wetland areas, which they did not. Pet. App. 30a. Admitting that her decision was "difficult and perhaps somewhat arbitrary," Judge Kennedy nonetheless concluded that six inundations over 80 years was "periodic" and thus the land fell within the Corps' jurisdiction. Judge Kennedy thereupon issued a preliminary injunction restraining filling in any area below a contour line at elevation 575.5 feet above mean sea level absent a Corps permit.[15]

Two years later, in February 1979, when the matter came on for a trial on the merits, the principal focus was whether there existed a hydrologic connection between the property and any navigable water. Based upon evidence taken during the preliminary injunction phase, together with additional facts produced at the trial, Judge Kennedy reinforced her initial finding that "the waters of Clinton River, Black River [sic] and Lake St. Clair do not contribute and 'have not contributed to the wetland-type vegetation on defendant's property' except for the periodic inundation [four to six inundations over 80 years]." Pet. App. 37a. In spite of that finding, Judge Kennedy made her preliminary injunction permanent. Pet. App. 27a.[16]

Following an initial appeal of the district court's ruling, the court of appeals remanded the action for reconsideration in light of new regulations adopted by the Corps on July 19, 1977. Pet.

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[15] Judge Kennedy selected the elevation of 575.5 feet above mean sea level as being the extent of Corps jurisdiction. That was the elevation below which *four* of the six inundations had occurred during 80 years, plus an additional one-half foot that Judge Kennedy allowed to accommodate normal monthly fluctuations above the mean. Pet. App. 30a-31a.

[16] Judge Kennedy also declared unconstitutional the then-existing Corps regulation—42 Fed. Reg. 37159 (1977) (codified at 33 C.F.R. § 326.4[e])—that prohibited the district engineer from processing a permit application while enforcement proceedings were pending against an applicant. Pet. App. 37a-41a.

App. 42a. The 1977 regulations revised the definition of "navigable waters" to be used for section 404 purposes. 42 Fed. Reg. 37122 (1977) (amending 33 C.F.R. § 323.1). Under the 1977 regulations, "navigable waters" include (with respect to inland wetlands) wetlands "adjacent" to lakes, rivers and streams that are navigable waters of the United States or interstate waters and their tributaries. Other waters, such as isolated wetlands, are included only if their degradation or destruction could affect interstate commerce. 42 Fed. Reg. 37144 (1977). The new "wetland" definition includes: "[A]reas that are *inundated or saturated by surface or ground water* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 42 Fed. Reg. 37128 (1977) (codified at 33 C.F.R. § 323.2) (emphasis added).

On remand to the district court, the government presented no new evidence. Judge Horace W. Gilmore determined that the Corps' new definition of navigable waters was "broader than its predecessor." Pet. App. 43a. Adopting the facts as found by Judge Kennedy, he concluded that the new regulations had no effect on Judge Kennedy's earlier ruling. Pet. App. 43a-44a. An appeal by Riverside to the Sixth Circuit Court of Appeals followed.

On March 7, 1984, the court of appeals reversed, holding that Riverside's land was neither a "wetland" nor a "navigable water" as defined by the Corps and thus was not subject to the Corps' section 404 regulatory jurisdiction. The court of appeals, in construing the CWA and the 1977 regulations to avoid the Fifth Amendment taking implications raised by the Corps' assertion of unbounded jurisdiction, concluded that for a "wetland" to be treated as "navigable waters," it must exist because of inundation or flooding from navigable waters at a frequency sufficient to cause the wetland vegetation. The mere presence of wetland vegetation resulting from some other cause (such as poor drainage), the court noted, is not sufficient. Pet. App. 10a. Were this not so, the court reasoned, areas that "inexplicably support some species of aquatic vegetation, but that are not normally inundated" would fall within the wetlands definition. Pet. App. 11a.

Under such circumstances, the Corps would be asserting jurisdiction over areas that were not truly aquatic and this, the court held, was not the intent of the regulations or the CWA. Pet. App. 11a. In view of the fact that the district court had found that there had been only four to six occasions of inundation over the 80 years of record-keeping and that the wetland vegetation growing on Riverside's property was not the result of inundation from, or any hydrologic connection to, any nearby waterbody, the court of appeals held that the Corps had improperly asserted jurisdiction under its regulations. The court thus reversed the judgment of the district court and vacated the injunction. Pet. App. 12a.

The government's motion for reconsideration and a hearing *en banc* was denied on June 8, 1984. Pet. App. 20a. In its order denying the petition, the court of appeals elaborated upon its initial decision by pointing out that were the government's position to be adopted, any low-lying land where water sometimes stands and where vegetation requiring moist soil conditions grows would be converted into "navigable waters" under the CWA "without regard to either their proximity to navigable waters . . . or the inundation of such lands by navigable waters." Pet. App. 20a-21a. The court found that interpretation inconsistent with the CWA.

During the pendency of the appellate proceedings, the Corps finally acted on Riverside's application to fill 30.6 acres of the property by denying the permit. Riverside's inability to obtain a permit to fill its lands has frustated its effort to use the property for any economically productive purpose, and the property remains vacant and unused today.

SUMMARY OF ARGUMENT

1. a. The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). To achive this goal, the act prohibits the discharge of pollutants from a point source into "navigable waters" except under permit. The Corps is authorized to regulate the "discharge of dredged or fill material" into "navigable waters" under section 404 of the act. 33 U.S.C. § 1344. Nothing in the act

authorizes the Corps to regulate "wetlands," except to the extent that a particular wetland is a part of a "navigable water" as that term is defined in the act.

The Corps has taken an act designed to control the pollution of "navigable waters" and, by regulation, has tried to transform it into the equivalent of a national wetlands preservation scheme. Through regulations promulgated in 1975 and 1977 the Corps brought within the reach of the CWA low-lying land areas that possess poor drainage or a seasonally high water table, but that are not connected in any fashion to a waterbody. The Corps construes its jurisdiction to go so far as to cover areas possessing wet soils for as little as five percent of the growing season and supporting trees and other vegetation merely tolerant of wet soils for a period of time. It is inconceivable that Congress intended to extend the reach of the CWA to lands of this sort when neither the term "wetlands" nor its equivalent ever appears in the text of the 1972 amendments to the CWA or the legislative history.

Here, the Corps claims that the land owned by Riverside is a "navigable water." The facts disclose, however, that the property in its natural condition had been farmed for close to 60 years. Moreover, it is a part of a platted subdivision in which site improvements such as sidewalks, sewers, and fire hydrants were constructed as early as 1916, is currently forested by oak and maple trees, and, most significantly, is neither connected to nor hydrologically a part of any waterbody.

The court of appeals correctly held that nothing in the CWA nor the Corps' regulations supports the classification of Riverside's land as "navigable waters" subject to regulation by the Corps. The court based its conclusion upon its analysis of the objectives of the CWA and the obvious meaning of the phrase "navigable waters" as used in the act.

b. Prior to 1972, there were two programs regulating water pollution. The first was the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, et seq., through which the Corps regulated dredging and filling and the discharge of pollutants into navigable waters of the United States and their tributaries. The Corps, by regulation, adopted a limited view of those waters subject to the Rivers and

Harbors Act and improperly excluded non-navigable portions of otherwise navigable waters and tributaries. The second program through which water pollution was regulated was the predecessor of the present CWA. As adopted, however, the original CWA regulated only the polluting of "interstate" waters, construed under that act as those navigable waters that cross state lines. Thus, many significant waterbodies were improperly omitted from pollution protection.

The 1972 amendments to the CWA sought to correct this deficiency by defining those waters to be regulated by the CWA as "waters of the United States." 33 U.S.C. § 1362(7). The purpose of defining waters in this manner was to bring within the regulatory jurisdiction of the CWA, not only those "navigable waters of the United States" that had been regulated, but also non-navigable portions of those waters, non-navigable tributaries, and waters that did not cross a state line which should have been regulated under the Refuse Act and the CWA, under then-existing case law defining "navigable waters." Also, the traditional boundary of "navigable waters of the United States" that had been used by various regulatory agencies (that is, the mean high watermark on tidal waters and the ordinary high watermark on inland waters) was not to be employed as a limit to jurisdiction under the CWA.

Thus, all areas covered by the waters of a navigable waterbody are to be subject to regulation under the CWA, including wetlands that are regularly inundated by those waters. On the other hand, land areas merely possessing wet soils, not caused by regular inundation (such as poor drainage), are not within the jurisdiction of the CWA. Riverside's land falls into this latter category.

c. "There is no single, correct, indisputable, ecologically sound definition for wetlands . . . ."[17] Wetlands include a broad spectrum of lands ranging from those areas that are perpetually inundated by a tidal waterbody, lake or stream to land areas that become wet for as little as five percent of the growing season and that support trees and other plants merely tolerant of moist soil

[17] *Classification of Wetlands* at 3.

conditions. As much as 100 million acres of land in the United States (excluding Alaska), much of which is either prime agricultural land or land that is suitable for other productive purposes, fall within this definition of "wetlands."

The government admits that its purpose in asserting jurisdiction over wetlands is to prevent the conversion of such areas to any other use. This is not pollution control—it is land use planning. Land use decisions have historically been left to the states under the police power. Certainly Congress did not, through enactment of the CWA, mean to usurp this traditional state function and the Corps should not be allowed to do so now through the promulgation of expansive regulations.

Not only did Congress intend to leave matters such as wetland regulation to the states, but the states in general, and Michigan in particular, have comprehensive regulatory schemes controlling the use of wetland areas. Thus, there is neither a legal basis nor a compelling need for the Corps to assume for itself the role of the nation's wetland protector.

2. a. The government requests reversal of the court of appeals decision, arguing that this Court should defer to the Corps in its interpretation and implementation of section 404 of the CWA. This is akin to placing the fox in the chicken coop. The Corps' administration of its responsibilities under section 404 has been marked by consistent failure to follow its congressional mandate and widespread abuse of its authority. Where, as here, there has been no express congressional delegation, and the agency has failed to act in a consistent or reasonable fashion, vacillating from one regulatory extreme to the other, this Court has consistently refused to defer to agency interpretations of an act. *S.E.C. v. Sloan,* 436 U.S. 103, 117-118 (1978); *Federal Maritime Commission v. Seatrain Lines,* 411 U.S. 726, 745-746 (1973).

The Corps has changed its definition of "navigable waters" on at least six different occasions since 1972.[18] The definitions have

[18] *See* 38 Fed. Reg. 12218 (1973); 39 Fed. Reg. 12119 (1974); 40 Fed. Reg. 19766 (1975); 40 Fed. Reg. 31320 (1975); 42 Fed. Reg. 37122 (1977); 47 Fed. Reg. 31794 (1982).

ranged from one (the 1974 version) that by all accounts fell far short of the intended reach of the CWA to the 1975 and 1977 versions that, as interpreted by the Corps here, expand "navigable waters" far beyond the wording of the CWA or any manifested intent of Congress. To defer to the Corps here would be to short-circuit the entire legislative process and vest in the Corps unrestricted authority to define its own jurisdiction.

b. The court of appeals correctly concluded that the CWA, by its explicit terms, does not embrace Riverside's land because its soils are wet for reasons wholly unrelated to frequent inundation from an adjacent water of the United States. Pet. App. 9a-12a. The decision of the court of appeals is reinforced not only by wording of the CWA and its legislative history, but also by regulations proposed by the Corps in 1983 in response to findings of the Presidential Task Force on Regulatory Relief. These more recently promulgated regulations are described by the Corps as being a "clarification" of the limits of its jurisdiction in wetland areas as established by its 1975 and 1977 regulations. 48 Fed. Reg. 21466 (1983). Thus, for a "wetland" to be classified as a "navigable water," and therefore subject to the Corps' jurisdiction under the CWA, the area must possess a "perceptable [sic] . . . hydrologic connection" to a "bordering, contiguous, or immediately neighboring" water of the United States. 48 Fed. Reg. 21474 (1983). Although this proposed regulation has not been made final by the Corps and is undoubtedly in excess of its authority, it does at least serve to clarify ambiguities in the 1975 and 1977 regulations relative to the necessity of frequent inundation.

c. The Corps' implementation of its obligations under section 404 has been uniformly criticized by Congress. This criticism led to amendments to the CWA in 1977 that exempted from the act certain activities.

Left unchanged was the original definition of "navigable waters." Congress' failure to adopt proposed amendments to the CWA that would have redefined the Corps' jurisdictional boundaries in terms equivalent to those employed in water pollution measures *prior to* the 1972 amendments to the CWA cannot be interpreted, as the government wishes, as a congressional affirmance of the Corps' unauthorized effort to expand its CWA

jurisdiction beyond that which Congress intended in 1972. *Federal Trade Com. v. Dean Foods Co.*, 384 U.S. 597 (1966). To give any such weight to inaction of Congress has been consistently rejected by this Court, for it is to engage in speculation of the highest sort. *Helvering v. Hallock*, 309 U.S. 106 (1940). The government's argument belies its own speculative nature, for it asks this Court to give greater weight to congressional *in*action occurring five years after the adoption of the CWA than to the express wording and legislative history of the act as adopted. The government's tortured concept of statutory construction should be rejected by this Court.

d. Contrary to the claim of the government, those lower court decisions that have considered the extent of the CWA's jurisdiction in "wetland" areas have, with two exceptions, involved areas that were frequently inundated by an adjoining water of the United States. The two exceptions are this case and one comparable to it, *United States v. City of Ft. Pierre*, 747 F.2d 464 (8th Cir. 1984). In both instances, the court of appeals concluded that low-lying inland areas not subject to regular inundation by a bordering navigable water of the United States are not subject to regulation under the CWA.

3. Congress did not intend to regulate wetlands under the CWA, except to the extent that they are a part of "navigable waters." Congress accordingly did not establish criteria or guidelines by which the Corps can determine whether or not a so-called "wetland" is to fall within the reach of the CWA. Congress did not intend to delegate wetland regulation to the Corps, leaving to the agency the duty to fill in the details. Rather, the fact that Congress established no criteria is clear evidence that it did not intend to regulate these areas at all. Were this not the case, an attempted delegation of the sort the government claims exists here would be an invalid and unconstitutional delegation of legislative authority. *See Industrial Union v. American Petrol. Inst.*, 448 U.S. 607, 673-674, 685-687 (1980) (Rehnquist concurring).

4. The court of appeals accurately perceived that application of the Corps' 1977 wetland regulations to Riverside would "prohibit any development or change of such property" and thus

"raises a serious taking problem under the fifth amendment." Pet. App. 14a. The court wisely avoided this regulatory taking by construing the 1977 wetland regulations narrowly so as to exclude Riverside's property from the definition of "navigable waters." This conclusion is eminently reasonable and conforms to the doctrine that where a statute is susceptible to more than one interpretation, that construction that will result in a taking of private property should be avoided. *United States v. Security Industrial Bank*, 459 U.S. 70 (1982).

ARGUMENT

I

THE CWA REGULATES ONLY THE DISCHARGE OF POLLUTANTS AND FILL INTO "NAVIGABLE WATERS." BY THIS TERM, CONGRESS INTENDED TO INCLUDE NAVIGABLE WATERS OF THE UNITED STATES, NON-NAVIGABLE PORTIONS OF THOSE WATERS AND TRIBUTARIES. CONGRESS DID NOT INTEND TO BRING WITHIN THE REACH OF THE CWA LAND AREAS POSSESSING WET SOIL CONDITIONS THAT ARE NOT CONNECTED TO A "NAVIGABLE WATER."

The extent to which Congress intended to regulate "navigable waters" through adoption of the 1972 amendments to the CWA is best understood when that act and its legislative history are viewed upon the backdrop of prior federal efforts to control water pollution. The federal government's power to regulate waters for the purpose of pollution control stems from the Commerce Clause of the United States Constitution. U.S. Const., art. I, § 8, cl. 3; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865). Waters that are navigable in fact and used, or susceptible of being used, in their ordinary condition, as highways for commerce, are subject to regulation by the federal government and are classified as "navigable waters of the United States." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). Over the years this Court has held that navigable waters of the United States subject to regulation under

the Commerce Clause include, in addition to those that are navigable in fact, those that may be made so with reasonable improvement, non-navigable portions of otherwise navigable waterbodies, and non-navigable tributaries of navigable waters. *See Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *Oklahoma ex rel. Phillips v. Guy F. Atchinson Co.*, 313 U.S. 508 (1941).

Use of Commerce Clause powers to regulate dredging, filling and pollution of navigable waters of the United States was first effected through the Rivers and Harbors Act of 1899. Under section 9 and 10 of this act, the Corps regulated the construction of dams, bridges, structures, and dredging and filling. 33 U.S.C. §§ 401, 403. Under section 13 (referred to as the Refuse Act), it regulated the deposit of any refuse material into navigable waters of the United States or any tributary thereof.[19] 33 U.S.C. § 407.

However, the Corps, in its administration of the Rivers and Harbors Act and the Refuse Act, had taken a restrictive view of the reach of its jurisdiction. By regulation, it had excluded from regulation non-navigable portions of navigable waters, tributaries and those portions of regulated waterbodies above the mean high waterline (tidal waters) or the ordinary high watermark (non-tidal waters). This view continues today. 33 C.F.R. §§ 322, 329.1-.12 (1982).[19a]

In addition to the Rivers and Harbors Act of 1899, pollution was also regulated under the predecessor of the CWA, adopted in 1948. 62 Stat. 1155. However, the original CWA extended pollution protection to only "interstate waters." "Interstate waters" were considered to be "all rivers, lakes, and other waters

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[19] Until approximately 1966, the Corps, in its administration of section 13 of the Rivers and Harbors Act, concerned itself primarily with refuse that affected navigation. However, a broader approach was taken after this Court's decision in *United States v. Standard Oil Co.*, 384 U.S. 224 (1966), in which it held that "refuse" included all pollutants.

[19a] *See National Wildlife Federation v. Alexander*, 613 F.2d 1054 (D.D.C. 1979); *Minnehaha Creek Watershed Dist. V. Hoffman*, 597 F.2d 617 (8th Cir. 1979).

that flow across, or form a part of, state boundaries." 62 Stat. 1161 (1948). Under this definition, waters that, though navigable, did not cross a state boundary were excluded from pollution protection. Congressional dissatisfaction with the limited geographic reach of this act led to a 1966 amendment that extended its jurisdictional boundaries to include the pollution of any "navigable waters of the United States." 80 Stat. 1246, 1252 (1966). Although this amendment brought jurisdiction of the CWA into line with the Rivers and Harbors Act, a number of significant waterbodies, and portions of those waters, remained unregulated by overly constrained administrative interpretations.

From the outset, the federal government's efforts to control pollution of the nation's waters suffered from a fundamental flaw: the inability to prevent pollutants from being discharged into waters in the first instance. The traditional control strategy had been to enforce pollution control measures only after discovery of pollutants in navigable waters of the United States.[20] This proved ineffective and difficult to administer, and it failed to accomplish the desired result of cleaning the nation's waters. Heightened concern over the quality of the nation's waters led to the 1972 amendments to the CWA which, for the first time, completely revised the underlying approach to water pollution regulation. The main thrust of the 1972 act was to control the discharge of pollutants from their source, before they reach "navigable waters." 33 U.S.C. §§ 1311, 1312, 1342, 1343; 1 Legis. Hist. 758; 2 Legis. Hist. 1429.[21]

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[20] The Federal Water Pollution Control Act was originally enacted by the Act of June 30, 1948, ch. 758, 62 Stat. 1155, and amended by the Acts of July 17, 1952, ch. 927, 66 Stat. 755; July 9, 1956 ch. 518, 70 Stat. 498; June 25, 1959, Pub. L. 86-70, 73 Stat. 141; July 12, 1960, Pub. L. 86-624, 74 Stat. 411; July 20, 1961, Pub. L. 87-88, 75 Stat. 204; Oct. 2, 1965, Pub. L. 89-234, 79 Stat. 903; Nov. 3, 1966, Pub. L. 89-753, 80 Stat. 1246; Apr. 3, 1970, Pub. L. 91-224, 84 Stat. 91; Dec. 31, 1970, Pub. L. 91-611, 84 Stat. 1818; July 9, 1971, Pub. L. 92-50, 85 Stat. 124; Oct. 13, 1971, Pub. L. 92-137, 86 Stat. 379; and Mar. 1, 1972, Pub. L. 92-240, 86 Stat. 47.

[21] Citations to "Legis. Hist." refer to the following four volume publication: Senate Committee on Environment and Public Works, *A*

The congressionally declared goal of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the elimination of the discharge of pollutants into "navigable waters." 33 U.S.C. § 1251(a). This goal is to be achieved principally through the National Pollution Discharge Elimination System under section 402 of the act, 33 U.S.C. section 1342, by which the Environmental Protection Agency sets discharge standards and regulates the discharge of pollutants into "navigable waters." An exception to the EPA's role under the act is created by section 404, 33 U.S.C. section 1344, which vests in the Corps the authority to regulate the discharge of "dredged or fill material" (classified as a pollutant) into "navigable waters."

Congress in 1972 was concerned that the Corps and agencies charged with the administration of the earlier water pollution control acts had construed those acts in a manner that left many substantial waterbodies free from federal regulation. 1 Legis. Hist. 178, 250-251. These agency interpretations were narrower in scope than the reach of the federal government's Commerce Clause authority over navigable waters as articulated by this Court.[22] Thus Congress, in defining "navigable waters" for purposes of the CWA, sought to liberate the definition from unduly restrictive past interpretations. Nevertheless, Congress understood that its Commerce Clause authority over navigable waters has limits in terms of those waterbodies that can be regulated. The legislative history of section 502(7), 33 U.S.C. § 1362(7), expressed Congress' view that the maximum extent of its ability to regulate waters under the Commerce Clause extends to navigable waters of the United States and non-navigable portions and tributaries of those waters.

Legislative History of the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Comm. Print 1973 and 1978).

[22] *See Oklahoma ex rel. Phillips v. Guy F. Atchinson Co.*, 313 U.S. 508 (1941); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921).

The waters subject to regulation under the 1972 CWA amendments are "navigable waters," which in turn are defined in a rather circuitous manner in section 502(7), 33 U.S.C. § 1362(7), as "waters of the United States, including the territorial seas." This definition resulted from a Senate-House Conference Committee amendment of the two versions of the act that were passed by the Senate (S. 2770, 92d Cong., 1st Sess. [1971]) and the House (H.R. 11896, 92d Cong., 2d Sess. [1971]). The Senate bill defined "navigable waters" as: "[T]he navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes." S. 2770, § 502(h). The House version was similar although simpler than that of the Senate; it omitted any specific reference to portions or tributaries of navigable waters: "[T]he term 'navigable waters' means the navigable waters of the United States, including the territorial seas." H.R. 11896, § 502(7). The Conference Committee retained the simplicity of the House version, but assured that the waters specified in the Senate version would be included by dropping the word "navigable." The conferees' description of their intent in selecting the final wording of the definition of their "navigable waters" is a recapitulation of the discussion originally set forth in the Senate and House Public Works Committee reports describing earlier versions of the definition—versions that uniformly included the term "navigable."[23] Elimination of that term had no greater significance than to assure Congress that the

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[23] The definition of navigable waters came from the Senate Committee on Public Works, which described its intent as follows:

> The control strategy of the act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters, the implementation of the 1965 act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

See 2 Legis. Hist. 1495 (FWPCA Amendments of 1971, *Senate Committee on Public Works Report Together with Supplemental Views to Accompany S. 2770,* Oct. 28, 1971).

CWA would be construed in accordance with the more recent decisions of this Court holding that non-navigable portions of navigable waterbodies and tributaries are subject to regulation under the Commerce Clause. The Senate Report on the Conference confirms this conclusion and provides:

> The Conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.
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> Based on the history of consideration of this legislation, it is obvious that its provisions and the extent of application should be construed broadly. It is intended that the term "navigable waters" include all water bodies such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other states or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases, the commerce on such waters would have a substantial economic effect on interstate commerce.

1 Legis. Hist. 178. The House Conferees confirmed that their intention was the same:

> *The new and broader definition is in line with more recent judicial opinions* which have substantially expanded that limited view of navigability—derived from *The Daniel Ball* case (77 U.S. 557, 563)—to include waterways which would be "susceptible of being used . . . with reasonable improvement," as well as those waterways which include sections

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The phrase that "water moves in hydrologic cycles" is often cited as being reflective of an intent to expand the reach of the CWA beyond "navigable waters of the United States." However, the phrase first appears in the legislative history with reference to S. 2770, which extended only to "navigable waters of the United States."

> presently obstructed by falls, rapids, sandbars, currents, floating debris, etc. [Citing among other cases: *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-410, 416 (1940); and *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921).]
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> Thus, *this new definition clearly encompasses all waterbodies, including main streams and their tributaries*, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill . . . .

1 Legis. Hist. 250 (Statement of Rep. Dingell) (emphasis added).

Congress' intent could not have been clearer. "Navigable waters" as used in the CWA is to include the navigable waters of the United States, non-navigable portions of those waters and tributaries. "Wet lands," other than those constituting part of the foregoing waterbodies, are not intended to be regulated. In fact, the term "wetlands" appears nowhere in either the 1972 act or its extensive legislative history. It is inconceivable that Congress intended to bring within the rigorous regulatory scheme of the CWA millions of acres of low-lying land that are not a part of or connected to a "navigable water" without once mentioning that category of land in either the act or its legislative history.[24]

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[24] Precise acreage figures of the amount of poorly-drained, inland areas falling within this category are hard to come by. It appears from studies performed by the United States Department of Interior that perhaps as much as 50 million acres of land may fall within this category (excluding Alaska). *See Circular 39* at 15, 18-25; *National Wetlands Inventory* at 28. Figures compiled by the Soil Conservation Service, U.S. Department of Agriculture, show that possibly 100 million acres currently exist in this category of land. American Water Resources Association, *Wetland Functions and Values: The State of Our Understanding* at 635 (1979).

II

CONGRESS' INTENT MILITATES AGAINST THE GOVERNMENT'S CONSTRUCTION OF THE CWA. MEASURED AGAINST A PROPER CONSTRUCTION OF THE ACT, THE CORPS' 1975 AND 1977 REGULATIONS, AS INTERPRETED BY THE DISTRICT COURT AND THE GOVERNMENT, FAR EXCEED THE CORPS' STATUTORY AUTHORITY.

A. Because the Corps' Regulatory Response to the CWA Definition of "Navigable Waters" Has Been Marked by Radical Changes and Inconsistencies Including the Present Effort to Exceed the Authority of the Act, Deference to the Corps' Construction of the Act is Not Warranted.

The government's contention that the court of appeals should be reversed on the ground that deference should be given to the Corps' interpretation of its own regulations borders on ludicrous. The Corps has, since 1972, adopted no less than six different wetland definitions. Commencing with its initial definition of "navigable waters," 38 Fed. Reg. 12217 (1973) (amending 33 C.F.R. § 209.120), and ending with the 1977 regulations, the Corps' efforts to define "navigable waters" have been marked by radical changes in policy and the use of ambiguous terminology.

Curiously, the Corps did not initially exhibit its unrestrained appetite for wetland regulation. In the first set of regulations it adopted to implement section 404, 38 Fed. Reg. 12217 (1973), the Corps, in defining "navigable waters," merely copied the statutory definition. These regulations did, however, offer the first wetlands definition: "[T]hose land and water areas *subject to regular inundation* by tidal, riverine, or lacustrine flowage." 38 Fed. Reg. 12220 (1973) (amending 33 C.F.R. § 209.120[g][3]) (emphasis added). This description of wetlands was included in each succeeding set of regulations until it was eliminated on July 19, 1977.[25]

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[25] The 1973 wetlands definition, 33 C.F.R. section 209.120(g)(3), appears in that portion of the regulations setting forth the policies to govern treatment of permit applications. The definition remained in this

The Corps' next effort to define "navigable waters" occurred on April 3, 1974. 39 Fed. Reg. 12115 (1974) (amending 33 C.F.R. § 209.120). These "final" regulations defined "navigable waters" for purposes of the CWA in terms indentical to the Corps' definition of "navigable waters of the United States" under the old Rivers and Harbors Act. 39 Fed. Reg. 12119 (1974) (amending 33 C.F.R. § 209.120). In proposing this definition, the Corps acknowledged that Congress intended that the CWA definition of "navigable waters" be given its "broadest possible constitutional interpretation unencumbered by agency determinations that have been made or may be made for administrative purposes." The Corps went on to conclude that such an interpretation was equivalent to the definition of "navigable waters of the United States" it had used for years. *See* 39 Fed. Reg. 12115 (1974).

The Corps' restriction of its jurisdiction under the CWA to its Rivers and Harbors Act limits was clearly wrong. This was quickly confirmed in two enforcement actions initiated by the EPA after the Corps had refused to prosecute. In *United States v. Holland,* 373 F. Supp. 665 (M.D. Fla. 1974), the EPA challenged the unauthorized filling of a wetland that was located above the mean high waterline, but was inundated daily by tidal waters. Similarly, in *United States v. Ashland Oil & Transportation Co.,* 364 F. Supp. 349 (W.D. Ky. 1973), the EPA initiated criminal prosecution for the unauthorized discharge of pollutants into a non-navigable tributary to a navigable waterbody. In both cases, the district courts concluded that Congress intended "navigable waters" as used in the 1972 amendments to the CWA to include the types of waterbodies involved.

The interagency dispute that raged between the EPA and the Corps over the proper interpretation of the CWA led to the filing of *Natural Resources Defense Council, Inc. v. Callaway,* 392 F. Supp. 685 (D.D.C. 1975) (hereafter *Callaway*), against the Corps and EPA. The purpose of the suit was to compel the Corps to revoke its April 3, 1974 regulations and to adopt a definition of

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portion of the regulations even after the adoption of amendments to other portions of the regulations that contain different wetland definitions. *See* 40 Fed. Reg. 31324, 31328 (1975).

"navigable waters" more in line with the posture taken by the EPA in the *Holland* and *Ashland Oil & Transportation Co.* cases.

The Justice Department undertook to represent both the Corps and the EPA, notwithstanding the fact that it had publicly taken a position consistent with that of the plaintiffs and EPA and contrary to that of its client, the Corps.[26] Effectively, the Corps was without representation in the proceedings. The Justice Department at no time offered a defense on the merits.[27]

The district court granted plaintiffs' motion for partial summary judgment, striking down "so much of 39 Fed. Reg. 12115, et seq. (April 3, 1974) as limits the permit jurisdiction of the Corps of Engineers by definition or otherwise to other than 'waters of the United States.' " The court ordered the Corps to promulgate new regulations.[28] *See Callaway,* 392 F. Supp. at 686. The decision was not appealed.

The Corps responded to the court order in *Callaway* by publishing proposed tentative regulations on May 6, 1975, 40 Fed. Reg. 19766, in which it offered four alternative definitions for public comment.

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[26] *See* Letter of Aug. 16, 1974, from Wallace H. Johnson, Assistant Attorney General, to Manning E. Seltzer, Office of the General Counsel, U.S. Army Corps of Engineers (Exh. 3 to Plaintiff's Statement of Material Facts as to Which Plaintiffs Contend There is No Genuine Issue Filed in Support of Motion for Summary Judgment, Nov. 21, 1974).

[27] *See* Callaway Motion to Dismiss, filed October 18, 1974; Callaway Opposition to Motion of Plaintiffs for Partial Summary Judgment, filed Jan. 6, 1975.

[28] Contrary to statements contained in many lower court opinions, the district court in *Callaway* did *not* endeavor to define for the Corps the reach of its jurisdiction under the CWA. The court merely ordered the Corps to adopt regulations consistent with the statutory definition of "navigable waters." In fact, Judge Robinson was of the view that the CWA definition of navigable waters and his order did not reach inland lakes, which he believed were not navigable waters under the CWA. Tr. Apr. 4, 1975 at 9-10.

On July 25, 1975, the Corps published "interim final regulations" in which it reformulated its definition of "navigable waters" under the CWA. 40 Fed. Reg. 31320-31343 (1975). Having initially failed to go as far as Congress intended, the Corps now went to the other extreme.

The 1975 regulations amending 33 C.F.R. § 209.120(d)(2) (1975) defined "navigable waters" as including (with respect to inland waters) rivers, lakes and streams that are "navigable waters of the United States" up to their headwaters, tributaries of those waterbodies, interstate waters, and intrastate lakes, rivers and streams that are utilized for certain specified purposes in interstate commerce. 40 Fed. Reg. 31324 (1975). Freshwater wetlands that are "contiguous or adjacent to other navigable waters and that support freshwater vegetation" were also included in the definition of navigable waters. Freshwater wetlands, in turn, were defined as

> those areas that are *periodically inundated* and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction ....

40 Fed. Reg. 31324-31325 (1975) (emphasis added).

The 1975 regulations, through any commonsense reading, contemplate that for wetlands to be classified as "navigable waters," they must be periodically inundated by an adjacent or contiguous navigable waterbody.[29]

In 1977, the Corps propounded another set of "final" regulations purporting to define "navigable waters" for purposes of section 404 of the CWA. 42 Fed. Reg. 37122-37164 (1977). Again, the Corps modified its definition of wetlands, explaining that it was endeavoring to clarify what it perceived to be uncertainty in the July 1975 version. *See* 42 Fed. Reg. 37128 (1977).

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[29] This construction is in harmony with the original 1973 definition of wetlands (those land and water areas subject to regular inundation by tidal. riverine, or lacustrine flowage) which was perpetuated in the 1975 regulations, but in a different section. 40 Fed. Reg. 31328 (1975) (33 C.F.R. § 209.120[f][3]).

Under the 1977 regulations, freshwater wetlands are characterized as navigable waters only if they are *adjacent*[30] to any inland waters, lakes, rivers and streams that are "navigable waters of the United States," tributaries to such waters, or interstate waters and their tributaries. 42 Fed. Reg. 37144 (1977) (amending 33 C.F.R. § 323.2[a][3], [4]). "Isolated wetlands" or wetlands that are not adjacent to navigable waters can only be regulated if "the degradation or destruction of [such wetlands] could affect interstate commerce."[31]

Wetlands are now defined as

> those areas that *are inundated or saturated by surface or ground water* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

42 Fed. Reg. 37144 (1977) (codified at 33 C.F.R. § 323.2[c]) (emphasis added).

The government argues that the 1977 regulations are susceptible to an interpretation that would, for the first time, include as "navigable waters" lands that support "wetland" vegetation solely because of poor drainage or a seasonally high water table and not because of inundation from any waterbody. This is a significant departure from the Corps' original concept that for wetlands to be treated as navigable waters they must be regularly inundated by

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[30] The term "adjacent" is defined as:

> [B]ordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

42 Fed. Reg. 37144 (1977) (codified at 33 C.F.R. § 323.2[d]).

[31] Thus, in the case of isolated wetlands, a factual inquiry to determine whether the filling of the area could affect interstate commerce is required before the Corps can assert jurisdiction. No such finding was made here.

surface waters. It is an even greater departure from the jurisdictional reach Congress intended for the CWA.[32]

As noted by the court of appeals here, the 1977 regulations' description of those wetlands that are "navigable waters" does not stand alone. It is accompanied by a lengthy preamble from which that court concluded that soils in "wetland" areas must become saturated by frequent inundation from an adjacent water for the area to come within the reach of the Corps' regulatory authority. 42 Fed. Reg. 37127-37128 (1977); Pet. App. 9a.

The ambiguity in the 1977 regulations concerning whether soils saturated by conditions unrelated to an adjacent water of the United States can be regulated under the CWA was one of a number of problems identified by the Presidential Task Force on Regulatory Relief on May 7, 1982. 48 Fed. Reg. 21466 (1983). In response, the Corps has proposed certain amendments to its regulations—amendments it proclaims are but a "clarification" of its existing wetlands definition and not an effort to change the scope of its jurisdiction. 48 Fed. Reg. 21467 (1983). As clarified by the Corps, wetlands constituting "waters of the United States" are only those "bordering, contiguous, or immediately neighboring *and* having a *resonably [sic] perceptable [sic] surface or subsurface hydrologic connection to a water of the United States.*" 48

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[32] Several federal courts have held that the CWA does not empower the EPA to control discharges into groundwater. *See Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977); *United States v. GAF Corporation*, 389 F. Supp. 1379 (S.D. Tex. 1975); *but see United States v. Phelps Dodge Corporation*, 391 F. Supp. 1181, 1187 (D.C. Ariz. 1975). In reviewing the language of the CWA itself, as well as its legislative history, the court in *Exxon* concluded:

> What we have found belies an intention to impose direct federal control over any phase of pollution of subsurface waters.

Exxon, 554 F.2d at 1322; *See also* 1329.

The legislative history of the act reveals that Congress rejected amendments to the CWA that would have provided for the regulation of groundwater pollution. *Id.* at 1328-1329.

Fed. Reg. 21474 (1983) (amending 33 C.F.R. § 328.3[b]) (emphasis added).[33]

By the Corps' own reckoning, the court of appeals' decision in this case accurately reflects the intent of both the CWA and the 1977 regulations. The district court below found that there was no hydrologic connection between Riverside's property and any water of the United States (i.e. the Clinton River, Lake St. Clair, or Black Creek). Pet. App. 25a, 37a. The court of appeals correctly concluded that since whatever wet soil conditions exist on Riverside's land are not the result of inundation from a water of the United States, the area is not subject to regulation by the Corps under section 404 of the CWA—precisely the reasoning and the result that would obtain under the Corps' 1983 clarification of its own regulations.

Ignoring this published clarification, the government urges that questions concerning the jurisdictional reach of the CWA be resolved by deferring to the Corps' past construction of its own regulations. Between 1972 and 1977, however, the Corps proposed no fewer than five wholly different definitions of navigable waters insofar as wetland areas are concerned. To this, we should add a sixth—the 1983 clarification. These various and varying interpretations differed not merely in minor technical phraseology, but in fundamental concepts as well. The definitions ranged from those that retreated from even the traditional definition of navigable waters of the United States to those that extended to areas that are not waters of any sort. Where an agency manifests this type of vacillation and indecision, its interpretation of a statute does not warrant deference by the courts. *Secretary of the Interior (Watt) v. California*, 464 U.S. 312 (1984); *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976).

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[33] The May 12, 1983 proposed regulations are described by Hon. William R. Gianelli, Assistant Secretary of the Army, as being a "clarification of the scope of the Corps' jurisdiction." *Possible Amendments to the Federal Water Pollution Control Act: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 98th Cong., 1st Sess. 2596-2598 (1983) (testimony of Asst. Secretary of the Army William R. Gianelli).

This Court, not the Corps, is the final authority on the question of the construction of the CWA and the limits of those areas Congress intended to classify as "navigable waters" under that act. *S.E.C. v. Sloan*, 436 U.S. 103, 118 (1978); *Federal Trade Com. v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). An agency construction of the statute that is inconsistent with this mandate cannot be upheld. *S.E.C. v. Sloan*, 436 U.S. at 118; *F.E.C. v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981); *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726, 745-746 (1973); *Volkswagenwerk v. F.M.C.*, 390 U.S. 261, 272 (1968). In other words, deference to agency construction of a statute is appropriate only where the agency's interpretation is in accord with the express wording of the statute and has been long-standing as well as consistent. *S.E.C. v. Sloan*, 436 U.S. at 117; *Volkswagenwerk*, 390 U.S. at 272-273; *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. at 745-746. An agency will not be permitted to "bootstrap itself into an area in which it has no jurisdiction" by construing its authorizing statutes in an inappropriate manner. *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. at 745.

This Court should not defer to the Corps' construction of the CWA. First, Congress, in adopting section 502(7) defining "navigable waters," had in mind specific waters that would fall within that definition. Those waters do not include poorly drained areas that are not a part of or regularly inundated by a navigable water. Second, the Corps' interpretation of that section has been in a state of perpetual vacillation, ranging from a construction that falls far short of Congress' initial intent to one that by all accounts far exceeds anything Congress had in mind. Lastly, the interpretation argued for by the government is patently unreasonable. "Wetlands" have never been classified as navigable waters in their own right. They can only be considered "navigable waters" under the CWA to the extent that they are inundated by navigable waters. It is for this reason that the term "adjacent" and equivalent terms first appeared in the Corps' regulations. Such terms served as a means of identifying those "wetlands" considered to be part of a navigable water. Now, the government maintains that the 1977 regulations do not require inundation from the "adjacent" waterbody at all. This claim would, for the

first time, classify as "navigable waters" areas that possess wet soils but are unrelated to any waterbody. Were the government's view accepted, one could well wonder why the Corps has always considered, and still considers, it important for a "wetland" to be "adjacent" to a waterbody. If a "wetland" and a waterbody have no hydrologic connection, what difference does their relative geographic proximity make for purposes of the CWA? Nothing in the CWA supports the government's construction.

The government would have this Court defer to an agency that has not only been inconsistent in implementing its regulations, but has extended those regulations in a manner unauthorized by Congress. The chaos wrought by the Corps in its implementation of section 404 demands judicial rebuke, not judicial deference.

B. The Corps' Interpretation and Construction of Its Own Regulations With Regard to Riverside's Land Has Been Arbitrary and Unreasonable and Was Properly Rejected by the Court of Appeals.

Having received what it erroneously perceived to be the "green light" to expand its jurisdiction without limitation as a result of the *Callaway* district court decision, the Corps has shed all vestiges of restraint in claiming authority over wetland areas. Thus, the Corps, in its *Wetlands Delineation Manual* goes so far as to include as "navigable waters" subject to Corps jurisdiction land that is saturated for as little as five percent of the growing season (which is far less than an entire calendar year) and that supports trees and other types of upland vegetation that merely tolerate wet soils for relatively short periods of time. *See Wetlands Delineation Manual* at 24-25, 43, 68. It is this type of thinking that led the Corps to assert jurisdiction over Riverside's property.

The Corps claims that the property is a "navigable water" even though it is not a part of or inundated by water from any waterbody; it was actively farmed for close to 60 years; it is partially developed with sidewalks, sewers, and fire hydrants in place; and its present condition is the result of physical alteration of the surrounding areas through development and flood control efforts in which the Corps participated. Assertion of jurisdiction

under these facts was correctly found by the court of appeals to be an unreasonable construction of the Corps' regulations and the CWA.

The government, seemingly aware of the fact that the Corps' actions here have been arbitrary at best, seeks to justify its position by asserting that a broad test for threshold jurisdiction over wetlands will somehow result in ease of administration for both the Corps and affected owners. The government builds upon this contention by claiming that "jurisdictional rules are of only limited utility" and thus they "should be established as broad as possible to allow all decisions regarding wetlands or potential wetlands to be made within the permit process allowed by the Corps alone." Pet. Brief 40-41. The government's position is truly disingenuous. It totally ignores the fact that assertion of jurisdiction over Riverside's property on the basis that it is a "wetland" virtually assures that no economic use of these lands is possible in view of the Corps' regulations and the mandatory guidelines imposed upon the Corps by the EPA. *See* 40 C.F.R. § 230.10-230.61 (1983); 49 Fed. Reg. 39478 (1984) (amending 33 C.F.R. § 320.4). It also ascribes greater expertise, fairness and efficiency to the Corps' implementation of its permit program than is justified. *See* Presidential Task Force on Regulatory Relief, *Administrative Reforms to the Regulatory Program Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act* (1982). In fact, the Corps' treatment of Riverside here exemplifies the type of arbitrary and unreasonable treatment landowners seeking permits from the Corps can expect. It took the Corps more than five years to process Riverside's permit, after which time the permit request was denied.

The government urges that the Corps' regulations be validated because they establish a jurisdictional test that can be readily applied by both landowners and regulators. Pet. Brief 43. This statement displays a total lack of knowledge of existing wetlands identification procedures. The *Wetlands Delineation Manual* presently employed by the Corps for delineating wetland areas

subject to its jurisdiction is more than 100 pages in length.[34] The bulk and complexity of the manual is simply an admission of the fact that in employing the very test the government urges be adopted, the determination of whether an area is a "wetland" subject to the Corps' jurisdiction can be very difficult. Requiring that the area be inundated regularly from a bordering water of the United States adds nothing by way of difficulty to an already complicated task. *See Avoyelles Sportsmen's League, Inc. v. Alexander,* 511 F. Supp. 278, 281-284 (W.D. La. 1981), *aff'd and rev'd Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 907-908, 910-913, 930-934 (5th Cir. 1983). In fact, the *Wetlands Delineation Manual* requires that a hydrologic study, together with a soil and vegetation analysis, be performed in every instance in order to determine whether an area is a wetland. *Wetlands Delineation Manual* at 7. Positive indicators from each of three areas—hydrology, soils, and vegetation—are required.[35] *See Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d at 930-934.

Contrary to the suggestion of the government, wetland determinations are not made by the landowner or the Corps through casual observation of the property—although that is precisely what occurred here with regard to Riverside's property.[36] They

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[34] The present version of the *Wetlands Delineation Manual* was published in January 1985 by the Corps. Although it purports to be a "draft," it is currently in use in the various district offices throughout the country.

[35] In this regard, the test employed by the Corps for determining whether an area is a wetland differs significantly from that employed by the Fish and Wildlife Service. *See Classification of Wetlands* at 3-4. The Fish and Wildlife Service system requires that a positive indicator of wetlands be present in only one of the three parameters employed by the Corps, while the Corps requires positive indicators in all three. *Wetlands Delineation Manual* at 8-9. This fact should be kept in mind when reviewing various federal publications discussing wetlands. Thus, publications such as the *Classification of Wetlands,* portions of *OTA Wetlands,* and *National Wetlands Inventory* employ the Fish and Wildlife Service definition—not that utilized by the Corps.

[36] The Corps' wetland determination upon which it predicted the institution of this litigation constituted a five-minute fly-over of the

require the use of highly skilled experts who are competent to analyze the vegetation, soils and hydrology of the site. A determination that the saturated soil conditions be related to frequent inundation from a navigable water requires no additional inquiry other than what is normally included in any competently performed wetlands determination. *See Wetlands Delineation Manual* at 9-12, 41-47. Thus, by insisting that wetland areas either be a part of or frequently inundated by a bordering navigable water in order to be classified as "navigable waters" within the CWA, the court of appeals adopted a test for delimiting those waters subject to regulation that is both rational and consistent with current wetland technology and the intended scope of the CWA.

C. The 1977 CWA Amendments Do Not Expand the Reach of Section 404 Beyond Those "Navigable Waters" That Were Intended to Be Included Within the CWA When Congress Enacted It in 1972. Therefore, Statements By Legislators After the Enactment of the 1972 CWA Amendments Do Not Reflect Legislative Intent Regarding Those Portions of the Act Defining "Navigable Waters."

The Corps' implementation of its responsibilities under section 404 of the CWA was the subject of widespread criticism from the very beginning. Initially, upon adoption of its 1974 regulations defining "navigable waters" under the CWA in terms identical to "navigable waters of the United States" under the Rivers and Harbors Act, the criticism came from the EPA and various environmental groups who were concerned with the Corps' recalcitrance in carrying out the very obvious intent of Congress. This, as mentioned earlier, led to the filing of *Callaway* and a judicial order requiring the Corps to revise its regulations. As if to spite its critics, the Corps intentionally went to the other extreme. Congressional hearings relative to the Corps' excessive conduct were held in 1975, 1976 and again in 1977, culminating in several amendments to the section 404 program in 1977. The most that can be said for the various congressional hearings is that they provided legislators ample opportunity to express virtually every

property and a quick visit to the site by a Corps employee who took no samples and was unable to identify any of the vegetative species growing on the site. J.A. 29-30.

view imaginable on the subject of wetland regulation without risk of being held accountable for any specific piece of legislation.

A great deal of opposition to the Corps' position on wetland regulation came from agricultural interests that were understandably concerned about the fact that the Corps had proclaimed that a large percentage of the best agricultural land in the country would fall within its wetland definition.[37] The 1977 amendments to section 404 were in great measure a congressional compromise designed to quiet the rather considerable objections being voiced by the nation's farmers.[38]

Although the legislative debates on the 1977 amendments contain expressions of the full spectrum of opinion concerning whether wetlands should be regulated, one universal complaint was expressed—the Corps had far exceeded the original intent of Congress. Typical are the comments of Senator Muskie—perhaps the most outspoken proponent of the CWA:

> There is not a Senator on the floor, including the Senator who is speaking, who supports section 404 as it has been interpreted and implemented by the Corps of Engineers. Much of the rationale of the Bentsen amendment is based on the reaction of the country to overregulation by the Corps of

[37] In fact, 40 percent of all non-federal lands possessing wet soils are used for agriculture. These soils account for slightly less than 25 percent of the total cropland in the United States. More than 50 percent of this land is classified as prime agricultural land by the United States Department of Agriculture. *See* Soil Conservation Service, United States Department of Agriculture, *Interagency Report* at 31-32 (1978).

[38] The 1977 amendments accomplished three goals. First, they provided for a general permit program that authorized the Corps—on a nationwide basis—to permit numerous activities that were deemed not to have a significant effect on water quality. CWA § 404(e), 33 U.S.C. § 1344(e). Second, normal farming, silviculture, and ranching activities such as plowing, seeding, and construction of drainage facilities were exempted from the CWA. CWA § 404(f), 33 U.S.C. § 1344(f). Third, a state could undertake to administer its own permit program for the discharge of dredged or fill material into navigable waters.

> Engineers of small farmers, foresters, normal agricultural activities, and so on.
>
> Nobody defends section 404 . . . .
>
> * * *
>
> *[S]ection 404 was enacted into law in 1972. The Corps proceeded to take that section and, by its interpretation, expand it far beyond any intent of Congress* . . . .

4 Legis. Hist. 947-948 (emphasis added). Statements such as this are hardly a ringing endorsement of the Corps' actions.

Ignoring the 1972 legislative history to the CWA, the government maintains that statements made by individual legislators in 1977 constitute either a congressional affirmation of the Corps' practices or a manifestation of legislative intent that should be engrafted onto the 1972 legislative history of the CWA. These post-passage remarks, no matter how explicit, cannot and do not express the legislative intent at the time of passage of the CWA. They merely represent personal views of certain individual legislators expressed years after Congress as a whole had acted. By placing greater significance on after-the-fact statements of legislators made under circumstances in which no legislative action was taken than on the wording of the CWA and its explicit contemporaneous legislative history, the government indulges in a bootstrap approach to statutory construction that has been consistently rejected by this Court. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *United States v. United Mine Workers of America*, 330 U.S. 258, 282 (1947); *Woodwork Manufacturers Asso. v. NLRB*, 386 U.S. 612, 639 n.34 (1967).

The government also argues that this Court should attach significance to the fact that Congress did not amend the CWA in 1977 to explicitly reject the Corps' expansive jurisdictional claims as represented in the 1975 regulations or to reverse broad interpretations of the CWA contained in some judicial decisions.[39]

[39] The regulations that were in effect during the legislative consideration of amendments to section 404 in 1977 were the July 25, 1975

This legislative inaction, the government maintains, is an expression of legislative intent, to which this Court should defer. The government is plainly wrong in its position, for it has long been held that the failure of Congress to act cannot be construed as an expression of legislative intent since it is susceptible to any number of inferences. *Unites States v. Wise*, 370 U.S. 405 (1962); *Federal Trade Com. v. Dean Foods Co.*, 384 U.S. 384 U.S. 597 (1966); *Helvering v. Hallock*, 309 U.S. 106 (1940). As stated by this Court:

> [T]o give weight to the nonaction of Congress [is] to "venture into speculative unrealities."

Federal Trade Com. v. Dean Foods Co., 384 U.S. at 609 n.11.

This principle governed a remarkably similar situation in *National Wildlife Federation v. Alexander*, 613 F.2d 1054 (D.D.C. 1979). There, the government unsuccessfully offered the same argument with regard to the interpretation to be given the Corps' amendments to its regulations in which it sought, *inter alia*, to abandon the requirement of an interstate connection for navigable waters under section 10 of the Rivers and Harbors Act. In 1976, Congress reacted to the revised regulations by contracting the Corps' jurisdiction through legislative exemptions pertaining to certain intrastate lakes and wharf construction. The government argued that Congress' failure to formally reinstate the requirement of an interstate connection consituted a tacit adoption of the Corps' new regulations. The court of appeals squarely rejected this notion, pointing out that congressional inaction does not necessarily imply approval.

> In sum, we do not believe that Congress' failure to correct all the problems it has found with the Corps' new regulations suggests ratification of the provisions it has not yet addressed.

regulations which, as discussed *infra*, require that for freshwater wetlands to be subject to regulation as waters of the United States, they must possess saturated soils that are the result of periodic inundation from a contiguous or adjacent navigable water. Thus, to the extent that any inference can be drawn from congressional inaction in 1977, it must be considered with reference to the 1975 regulations and not the 1977 version.

> Rather, we believe its voiced dissatisfaction with them indicates disagreement.

National Wildlife Federation, 613 F.2d at 1065.

In sum, nothing has happened since adoption of section 502(7) of the CWA in 1972 that in any way alters the original interpretation Congress intended to be given the term "navigable waters." The CWA encompasses those waterbodies that are navigable in fact and non-navigable portions and tributaries of such waterbodies. "Wetlands," *to the extent that they form a part of those waterbodies or are regularly inundated by navigable waters*, are properly to be considered subject to the CWA. However, unconnected low-lying areas that are not regularly inundated by waters from a navigable water are not incorporated within the navigable waters definition of the act and, therefore, are not subject to the Corps' section 404 jurisdiction.

III

THE ONLY TWO COURT OF APPEALS DECISIONS TO CONSIDER THE QUESTION OF WHETHER A "NAVIGABLE WATER" WITHIN THE MEANING OF THE CWA EXTENDS TO SATURATED SOIL AREAS NOT REGULARLY INUNDATED BY A NAVIGABLE WATER HAVE CONCLUDED THAT THE ACT WAS NOT INTENDED TO REACH THOSE LANDS.

The government endeavors to buttress its extravagant interpretation of the CWA by referring to broad statements contained in some lower court decisions to the effect that Congress intended to give the definition of "navigable waters" a broad interpretation consistent with the limitations upon Congress to regulate waters under the Commerce Clause. However, in determining how far Congress intended to regulate under the Commerce Clause, the wording of the CWA cannot be ignored. That act limited Commerce Clause regulation to "navigable waters," which in turn is defined as "waters of the United States." This definition is broad enough to include areas that form a part of those waters and are regularly inundated by them, but not land that is neither a part of a waterbody nor regularly inundated by it.

The cases relied upon by the government simply do not support the proposition that Congress intended to include within the CWA land areas that are sometimes wet for reasons unrelated to frequent inundation from a water of the United States. Thus, in virtually every "wetland" case cited by the government, the area addressed received regular, if not daily, inundation from an adjoining water of the United States. *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974) (the holding of which the plaintiffs in *Callaway* sought to have engrafted into new Corps regulations), involved wetlands that bounded a tidal waterbody and, although they lay above the mean high waterline, received *daily inundation* by the tides. The land in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983), was a backwater swamp annually flooded by adjoining rivers for durations extending up to six months at a time. The wetlands in *United States v. Tilton*, 705 F.2d 429 (11th Cir. 1983), were directly linked hydrologically to a river 30 feet away. In *United States v. Texas Pipe Line Company*, 611 F.2d 345 (10th Cir. 1979), a discharge of oil into an unnamed tributary of a named creek that discharged into the Red River was an issue. The court found that the oil flowed from the point of discharge through the tributaries into the river. *State of Utah by & through Div. of Parks v. Marsh*, 740 F.2d 799 (10th Cir. 1984), did not concern wetlands at all, but rather an intrastate lake—Utah Lake—the largest freshwater lake in the State of Utah. The lake has a surface area of 150 square miles and is used for purposes in interstate commerce. The court in *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978), considered the effect of the CWA on thousands of acres of salt ponds that, although not subject to tidal action, were submerged by waters taken from San Francisco Bay to the extent of 8 to 9 billion gallons per year and employed in the production of salt transported in interstate commerce throughout the western states. In *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979), the court found as a fact that the areas characterized by wetland vegetation bordering a large lake were periodically inundated by waters from the lake as well as water from other sources.

In *United States v. Huebner*, 752 F.2d 1235 (7th Cir. 1985), the land involved was a large wetland area through which water

flowed on its way to a surrounding federal wildlife refuge. The source of the water is not clear from the opinion. Further, the landowner never challenged the authority of the Corps to regulate the area as wetlands under the CWA, and thus the issue was neither presented to nor determined by the court. The court only considered whether, under the circumstances present, the agricultural exemption contained in the 1977 regulations would be applied to accommodate Huebner's expanding operations.

The one case that rather closely parallels this dispute is *United States v. City of Ft. Pierre*, 747 F.2d 464 (8th Cir. 1984). There, the court held that section 404 did *not* reach wetland areas that did not form naturally and that existed principally through changes in drainage patterns resulting from the Corps' dredging activities in the Missouri River. The area in question had historically been a side channel of the Missouri River but had been separated from that waterbody in 1907 by construction of a railroad bridge approach. For the next 60 years the area was dry and wooded. This condition was altered in the 1960s when the Corps, as a part of its regular river maintenance dredging, altered drainage patterns to such an extent that the soils became saturated and supported wetland vegetation.

Contrary to the government's claim, lower court decisions have not squarely dealt with the issue presented here. *United States v. City of Ft. Pierre* comes the closest and there the court of appeals ruled against the government's position. The court of appeals in *United States v. City of Ft. Pierre*, as did the lower court here, found that Congress did not intend to include as "navigable waters" under the CWA areas whose soils become saturated for reasons unrelated to natural surface inundation from an adjoining water of the United States.[40]

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[40] The court of appeals in *United States v. City of Ft. Pierre* rejected the government's argument that it makes no difference how or when an area becomes a wetland. The government makes the same claim here and it should similarly be rejected.

IV

GIVEN THE TOTAL ABSENCE OF ANY GUIDELINES OR CRITERIA IN THE CWA BY WHICH THE CORPS CAN MEASURE ITS IMPLEMENTATION OF THAT ACT IN WETLAND AREAS, A CONSTRUCTION OF THE ACT THAT RESULTS IN THE BROAD DELEGATION CLAIMED BY THE GOVERNMENT CONSITUTES AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE FUNCTIONS TO AN AGENCY.

The government conveniently overlooks the fact that nowhere in the CWA is there any suggestion that the Corps is to regulate land that is unrelated to any waterbody. The government asks that this Court infer such a delegation. To do so, however, not only requires that this Court conclude that Congress intended to regulate 100 million acres of land (excluding Alaska) without specifically saying so, but also delegated responsibility for this vast job to the Corps without providing any guidelines or criteria to guide the Corps in the administration of its delegated duties.[41] In the government's view, Congress left to the Corps the determination of how far its jurisdiction should extend, under what circumstances permits should be granted, and what criteria are to be employed for the granting or denial of permits. These are, however, fundamental policy considerations that are legislative in nature. Accepting the government's view would acknowledge that Congress delegated its legislative power to the Corps. Interpreted in this way, the CWA would violate the constitutional prohibition against the delegation of legislative functions to an agency. *See Industrial Union v. American Petrol. Inst.*, 448 U.S. 607, 673-674, 684-687 (1980) (Rehnquist concurring); *United States v. Robel*, 389 U.S. 258, 274-276 (1967); *Panama Refining Co. v. Ryan*,

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[41] The government's position here is inconsistent with the views of the Assistant Secretary of the Army (Civil Works), W. R. Gianelli, who in 1983 admitted that the CWA was neither intended nor designed to regulate wetlands. *See Possible Amendments to the Federal Water Pollution Control Act: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 98th Cong., 1st Sess. 2596-2598 (1983) (testimony of Asst. Secretary of the Army William R. Gianelli).

293 U.S. 388, 428-430 (1935); *Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 407-409 (1928).

The CWA must be interpreted so as to avoid questions of its constitutionality. *Industrial Union v. American Petrol. Inst.*, 448 U.S. at 646; *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979); *Crowell v. Benson*, 285 U.S. 22, 62 (1932). The court of appeals avoided construing the CWA in a fashion that would call into question its constitutionality relative to an unbridled delegation to the Corps of legislative functions.[42] It did so by placing a reasonable limit upon the definition of "navigable waters"—the requirement that the area be inundated by waters from a navigable water.

V

WETLAND REGULATION, EXCEPT WITH RESPECT TO WETLANDS THAT ARE A PART OF NAVIGABLE WATERS, IS NOT THE SUBJECT OF THE CWA AND HAS BEEN LEFT TO THE STATES.

There can be little question from reading the government's and its supporting amici briefs that what is sought here is to expand the CWA into the equivalent of a national wetlands preservation act through use of the Corps' 404 dredge and fill program. The government's announced goal in seeking reversal of the court of appeals is to freeze the nation's wetlands in their present state.[43]

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[42] The lack of any guidelines or criteria in the CWA relative to wetland regulation is exacerbated by the fact that violation of section 404 carries heavy criminal and civil penalties. 33 U.S.C. § 1344(s).

[43] The government ignores the fact that it is the federal government that has been responsible in large measure for the conversion of more than 65 million acres of wetlands into valuable agricultural lands. This has occurred through the swamp land acts of 1849, 1850 and 1860, by which the United States granted to fifteen states, including Michigan, approximately 65 million acres of swamp land for the express purpose of reclaiming those wetlands through the construction of levees and drains in order to transform these swamp and overflowed lands into valuable lands, usable for agricultural and other purposes. 43 U.S.C. § 981; *National Wetlands Inventory* at 33; *Circular 39* at 5-7; Donaldson, *The Public Domain* at 219-220 (1970). Confirmation of swamp and overflowed lands to the states under the swamp land acts still continues.

See generally OTA Wetlands; National Wetlands Inventory; Circular 39.

A large percentage of the "wetlands" claimed by the government to be subject to Corps regulation are similar to Riverside's property in that they have no water connection or relationship to any waterbody and possess wet soil conditions solely because of poor drainage.[44] These lands are obviously capable of being used for a wide variety of purposes. In fact, lands possessing wet soil produce approximately 25 percent of the major crops grown in the United States.[45] Use of these and many other low-lying areas for agriculture and other purposes poses no threat to water quality. The same is true of Riverside's land which, as the district court found, has no water connection to any waterbody and, thus, the placement of fill on the property will not impact water quality.

By seeking an interpretation of the definition of "navigable waters" that includes all "wetland" areas (including those that are not necessary to prevent water pollution) in order to prevent conversion of these lands to some other use, the government is asking that the Corps be authorized to engage in land use planning. Such determinations have historically been left to the states, not the federal government. *See Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975); *see also Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 187 (3rd Cir. 1983). Congress did not intend that the CWA infringe upon the states' prerogative of land use regulation. 33 U.S.C. § 1251(b); *see also Mississippi Comm. on Natural Resources v. Costle*, 625 F.2d 1269, 1276 (5th Cir. 1980).

Wetland regulation is widespread at the state level. Most states have some form of wetland regulation. Michigan possesses a

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[44] *See generally Classification of Wetlands; National Wetlands Inventory; Circular 39; Wetlands Delineation Manual.*

[45] *See* Soil Conservation Service, U.S. Dept. of Agriculture, *Interagency Report* at 31-32 (1978); American Water Resources Association, *Wetland Functions and Values: The State of Our Understanding* at 633-640 (1979).

comprehensive wetland regulatory act, the "Goemaere-Anderson Wetland Protection Act." Mich. Comp. Laws Ann. § 281.701, et seq. (1980).[46] This act has a greater geographic reach than even the Corps' construction of the CWA. It regulates not only wetlands that are regularly inundated by a waterbody, but also isolated wetland areas. The dredging, filling, draining, construction and development of a wetland is prohibited except under permit. The criteria governing the granting or denying of a permit are tailored to the specific needs of Michigan. The act also provides that in the event a taking of property occurs through its implementation, compensation is to be paid. Mich. Comp. Laws Ann. § 281.721 (1980).

The government's contention that the CWA must be broadly construed to incorporate all wetlands in order to preserve these areas for ecological reasons simply has no applicability in Michigan and other states that possess their own far-reaching wetland protection acts implemented under the police power. The claimed necessity of pervasive wetland regulation is a makeweight argument offered by the government to justify a major step into the realm of federal land use regulation. However, the argument fails for the simple reason that Congress did not intend the CWA to be an act through which wet soil areas, other than those that are a part of navigable waters, are to be protected. As observed by the district court below, draining areas within the CWA's jurisdiction

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[46] In addition to the "Goemaere-Anderson Wetland Protection Act", Michigan also regulates wetland areas through a network of other regulatory schemes. Thus, dredging, filling, construction, and other alterations below the ordinary high watermark on all inland lakes and streams are subject to permit. Mich, Comp. Laws Ann. § 281.951-281.963 (1980). The Michigan State Department of Natural Resources and Water Resources Commission have established a comprehensive plan for the use and management of shorelands on lakes and rivers. Likewise, local governmental units, subject to state approval, regulate erosion-prone areas and areas improtant to fish and wildlife. Michigan Shorelands Protection and Management Act, Mich. Comp. Laws Ann. § 281.631 (1980). State permits are also required for activities in state-identified floodplain areas. Mich. Comp. Laws Ann. §§ 323.5(b), 560.117 (1980).

is not prohibited by the act. Pet. App. 30a. Thus, there is no bar to drying out, and thereby destroying, wetland areas. Nor does the CWA prevent excavating, flooding or burning of wetland areas, or the removal of wetland vegetation. *See OTA Wetlands* at 94-110, 168-169. Surely, if wetland preservation were the focus of the act, these means of eliminating wetlands would have been regulated.

The total absence of any reference to wetland regulation in the CWA must be juxtaposed to those federal acts that Congress has adopted for the specific purpose of protecting or acquiring those wetland areas that require federal protection. The existence of these federal wetland protective measures demonstrates not only that ample protection for wetlands currently exists, but also that Congress knows how to regulate wetlands when it chooses to do so. The vehicle most often employed by Congress to protect wetlands has been either to acquire the land or to offer financial assistance to private owners of wetlands to encourage the preservation, restoration and rehabilitation of the areas for fish, bird, and wildlife habitat, soil conservation, water pollution control, and flood control. For example, the Water Bank Act, 16 U.S.C. §§ 1301-1311, established a program for wetlands preservation by providing financial incentives to private owners to prevent loss of wetlands. Congress, proclaiming its purpose in creating the program, found

> that it is in the public interest to preserve, restore, and improve the wetlands of the Nation, and thereby to conserve surface waters, to preserve and improve habitat for migratory waterfowl and other wildlife resources, to reduce run-off, soil and wind erosion, and contribute to flood control, to contribute to improved water quality and reduce stream sedimentation, to contribute to improved subsurface moisture, to reduce acres of new land coming into production and to retire lands now in agricultural production, to enhance the natural beauty of the landscape, and to promote comprehensive and total water management planning.

The Federal Aid in Fish Restoration Act, 16 U.S.C. §§ 777-777(k), authorizes federal involvement in and financial aid to the states for the rehabilitation of land or water areas that are

adaptable for fish restoration and conservation purposes. Similarly, the Federal Aid in Wildlife Restoration Act, 16 U.S.C. § 669-669(i), provides for federal involvement in comparable projects for wildlife restoration and conservation purposes. The Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464, offers blanket protection for coastal wetlands as a part of approved state programs. Lastly, the Wetlands Acquisition Act, 16 U.S.C. § 715(k)(3)-715(k)(5), provides funds "to promote the conservation of migratory waterfowl and to prevent the serious loss of important wetlands." 16 U.S.C. § 715(k)(3).[47]

It is apparent that when Congress has endeavored to protect wetlands, it has openly expressed its purpose and clearly defined the means to implement that purpose. That the CWA lacks any such clear expression relating to "wetlands" refutes the government's contention that the act was intended to implement a wetlands preservation scheme.

VI

APPLICATION OF THE CORPS' WETLAND REGULATIONS TO RIVERSIDE WILL RESULT IN A TAKING OF RIVERSIDE'S PROPERTY WITHOUT COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION.

The court of appeals, in construing the Corps' regulations, was of the opinion that were the regulations to be construed in the manner advocated by the government, the result would be to confer upon the Corps "unbounded jurisdiction" resulting in a taking by the government of Riverside's property in violation of the Fifth Amendment. Pet. App. 13a-16a. That court avoided this outcome by construing the Corps' regulations narrowly. The court

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[47] *See also* Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666(c) (conservation of wildlife and wildlife habitat areas); Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431-1439 (establishment of marine sanctuaries below the high watermark, including some wetland areas); Watershed Protection and Flood Prevention Act, 16 U.S.C. §§ 1001-1005 (providing federal assistance for flood prevention and erosion control of the nation's watershed).

therefore refused to classify "a piece of property a mile inland from Lake St. Clair that has been farmed in the past and is now platted and laid out for subdivision development with the fire hydrants and storm sewers already installed" as a "navigable water." Pet. App. 13a-14a. The approach adopted by the court of appeals is patently reasonable and supported by the doctrine that statutes and regulations that may be susceptible of more than one interpretation will not be construed in a fashion to conflict with the Constitution or to effect a taking of property in violation of the Fifth Amendment. *United States v. Security Industrial Bank*, 459 U.S. 70, 74-81 (1982); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974); *United States v. Johnson*, 323 U.S. 273, 276 (1944).

The Riverside property presently is totally unproductive, lying vacant and unused. Although in former times it had been farmed, that use terminated with the construction of sewers and fire hydrants in the late 1950s and early 1970s. J.A. 84, 93-99. Even if future agricultural use of the land were economically viable—which it is not—that use would hardly be compatible with the existence of site improvements such as sewers and fire hydrants.

Given the present condition of the property, together with local zoning requirements, fill is a necessary element of the development of the property for any economically productive purpose. J.A. 87-88. The Corps has already taken a position as to how it would treat such a proposed fill through its denial of Riverside's permit application. We therefore need not speculate as to what would be the ultimate result were the property to be subjected to the Corps' regulatory scheme. The property would simply remain as it is now, vacant, unused and deprived of any economic productivity.

The government maintains that lands such as Riverside's property should be preserved in their present state. This goal is implemented by the Corps' regulations which provide that it is against the public interest to grant a permit in a wetland area and that a permit be denied for a proposed fill in a wetland area,

except in two limited circumstances.[48] The two exceptions are: (1) a "water dependent" project, or (2) a project for which there is no practicable alternative site available. Neither of these two exceptions apply here.

The necessity that a project, to be constructed in a wetland area, be water dependent points out the absurdity of the government's position relative to whether Riverside's land is subject to section 404 at all. The water-dependency requirement contemplates that wetlands subject to regulation are lands that border a navigable water, for how else could a water dependent project be constructed? Here, Riverside is confronted with the classic Catch-22 situation. To have any opportunity to obtain a permit, it must devote its lands to a water dependent project, but, because of the fact that its lands are nowhere near water, such a project is impossible. This patent inconsistency in the regulations is eliminated by the holding of the court of appeals.

Similarly, the requirement that Riverside must demonstrate that no practicable alternative site is available is also incapable of satisfaction. Practicable alternatives under the regulations include other sites not within the ownership of the applicant. *See* 40 C.F.R. § 230.10 (1984). Thus, in order to comply with this requirement, Riverside must demonstrate that no other plot of land is available for its proposed project, regardless of ownership. Since the only legally permitted and rational use of Riverside's land is for a housing development, Riverside would have to show that no other land in the area is available for this purpose. This is not the case.

It is beyond question that it is possible, though not permissible, for the enactment of a statute or adoption of a regulation to accomplish a taking of private property in violation of the Fifth Amendment just compensation clause. *Ruckelshaus v. Monsanto Company*, No. 83-196 (June 26, 1984); *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 636-661 (1981) (Brennan dissenting); *Kaiser Aetna v. United States,* 444 U.S. 164 (1979);

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[48] 33 C.F.R. § 320.2-.4 (1982) (as amended by 49 Fed. Reg. 39478 [1984], incorporating EPA § 404[b][*1*] guidelines, 40 C.F.R. § 230.10[a], [2], [3]).

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); *United States v. Central Eureka Mining Co.,* 357 U.S. 155 (1958). The determination of whether such a taking has occurred requires a factual inquiry considering factors such as "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 83 (1980); *Kaiser Aetna v. United States,* 444 U.S. at 175; *Ruckelshaus v. Monsanto Company,* 467 U.S. ____ (1984).

The court of appeals correctly perceived the taking ramifications of finding the Riverside lands subject to the Corps' jurisdiction. The criteria contained in the Corps' regulations relative to the granting of a permit in a wetland area assure that a permit will be denied. Under such circumstances, the economic impact upon Riverside would be total, for there is no economic use remaining in its lands. The property would remain vacant and unused and the investment-backed expectations of Riverside would be totally thwarted. For close to 30 years, Riverside has been endeavoring to develop these lands for a residential subdivision. The lands have been platted and zoned accordingly. Site improvements in the form of sewers and fire hydrants have been installed. The investment-backed expectation of completing its development cannot be attained if the Corps' regulations are to be applied. Riverside's fundamental property right—the expectation of being able to use the property for some reasonable economic use—will be taken without the payment of compensation in violation of the Fifth Amendment. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). That the taking occurs through what the government claims is the exercise of its rights under the Commerce Clause is of no consequence. It is a taking nonetheless and is prohibited by the Constitution. *Id.* at 172-173.

The taking question here is a serious one—but one that need not be confronted if the court of appeals' construction of the CWA is affirmed. Here, there is no expression by Congress that it intended the definition of "navigable waters" to be construed so broadly that lands such as Riverside's would by subjected to Corps jurisdiction under section 404. In the absence of such an expression of intent, this Court should not adopt a construction of

the act that would impress Riverside's property with Corps jurisdiction, for to do so would lead to an unconstitutional taking. *See United States v. Security Industrial Bank*, 459 U.S. 70 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

CONCLUSION

For all of the foregoing reasons, the judgment of the United States Court of Appeal for the Sixth Circuit should be affirmed.

Respectfully submitted,

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(Appendices follow)

Appendix

1a

January 21, 1977, morning session
Testimony of Herbert Glascow

HERBERT GLASCOW,

having been first duly sworn, was examined and testified upon his oath as follows:

DIRECT-EXAMINATION

BY MR. DANK:

Q. Mr. Glascow, let us have your business address and your occupation.

A. Building official, Harrison Township, 38151 L'Anse Creuse.

Q. What period of time have you been a building official?

A. Ten years, in February.

Q. What are your duties?

A. I'm in charge of building, zoning, and ordinances.

Q. Are you familiar with the parcel of land that is the subject of this controversy and the land surrounding it?

A. Yes, sir.

Q. How long—do you reside in Harrison Township?

A. 25 years.

Q. Have you known this area for the past 25 years?

A. Yes.

Q. Are you familiar with the subdivision status of the portion of this parcel of land?

A. I am.

Q. And can you tell us what, if anything, you know about an improvement which may be constructed on this property?

A. There's an easement on the north side of Helzer that sewer lines was installed during the overall picture of—sewer installation picture in the township.

THE COURT: When was that, roughly, the period?

A. '70, 1970. Sewer down Detroit Street, Arbor, Macomber.

January 21, 1977, afternoon session
Testimony of Herbert Glascow

MR. DANK: Would you on Exhibit 60 with this red pen draw an area showing the direction in which you were looking when the picture was taken.

MR. BEHRINGER: Did he take these pictures?

THE WITNESS: Yes.

THE COURT: And you are saying?

THE WITNESS: That tree right there is approximately where A is. That's where the pump was, at Detroit Street. It might be ten feet over, but it's within ten feet of that pipe.

THE COURT: You are saying that the large tree shown in Exhibit 61 was roughly in the area where A is shown?

THE WITNESS: That's correct.

THE COURT: On Exhibit 60?

THE WITNESS: That's correct. I was standing here and looking across these trees here. That branch that I have over there was taken from the top of these trees and the branch was taken from this oak right here, and that wedge was taken out of that tree right there.

Q. (By Mr. Dank, continuing): The branch I am going to show you has a tag on it labeled Exhibit 66?

A. That's the branch.

Q. It's taken from which tree?

A. From one of those trees right here.

THE COURT: In the foreground on the right in Exhibit 61?

THE WITNESS: That is correct.

THE COURT: All right.

MR. DANK: All right.

Q. (By Mr. Dank, continuing): Has that tree been partially covered with fill?

A. It was pushed over. That's why they're leaning at an angle. These trees weren't, but that tree, there was a tree there. They were pushed over right at the base of the fill.

Q. There seems to be a larger tree in the background of this picture. Could you tell whether or not that tree was alive or dead?

A. The tree was dead.

THE COURT: You are talking about the biggest one?

THE WITNESS: I'm talking about that oak tree right there. That's where that was taken out of.

Q. (By Mr. Dank, continuing): Now, you said that's what that was taken out of. You are referring to this tree here with bark on the outside?

A. Yes.

Q. It has that tag on it marked Exhibit 65?

A. That is correct.

Q. Did you personally remove that?

A. I removed that myself with the ants we found afterwards. I wasn't aware of it at the time.

THE COURT: We found another one today you know.

THE WITNESS: I wasn't aware of that.

THE COURT: It was dispatched.

Q. (By Mr. Dank, continuing): Do you have some experience with the common varieties of trees grown in Harrison Township?

A. Yes.

Q. Can you tell what kind of trees those were from which you took the leaf and the wedge?

A. That's an oak tree. We should have asked the biologists that were here. They probably have a better knowledge of the type, but they're both in the category of oak, which I guess there's about a dozen different oaks, but it's oak.

Q. Proceeding now to the map which you made on Exhibit 60, proceed to point B and tell us what that is.

A. That was taken—do you want me to use that red pencil again?

Q. Yes.

THE COURT: You are saying Exhibit 62?

MR. DANK: Exhibit 62 is a photo that was taken from that point.

THE COURT: Looking in which direction?

THE WITNESS: This was taken in this direction, roughly this location that we were just outside of Helzer—I mean outside of the fill area.

THE COURT: Which direction was the camera pointing when that picture was taken?

THE WITNESS: To the east.

THE COURT: Okay.

Q. (By Mr. Dank, continuing): As near as you could determine were those trees growing in the area that had been referred to here as the 20-acre parcel?

A. That is correct.

Q. And looking at Exhibit 59, which is on the board here, can you give us an indication from there about where those trees would be located?

A. I would say about here.

THE COURT: Whose map is that? We already marked that one up.

MR. DANK: Yes. That was Exhibit 59.

THE COURT: Have we marked this?

MR. DANK: No. That's what Mr. Bridges testified.

THE COURT: You don't have any objection, do you?

THE WITNESS: I have no objection.

THE COURT: Why don't you put a mark on it.

MR. DANK: Put trees from Exhibit 62.

THE COURT: Just put the number 62.

MR. DANK: 62.

THE COURT: And your initials. Okay. Thank you.

MR. DANK: All right. Proceed now then to Exhibit 63 point C on your map.

THE COURT: The view shown is C, is it?

THE WITNESS: That's correct.

THE COURT: The view shown in 62 is the area circled as C?

THE WITNESS: That is correct.

Q. (By Mr. Dank, continuing): Or is that the point you were standing at?

A. Well, in that vicinity, and I was facing the river road which is over here like that.

Q. All right. Can you describe for us what the objects are in there?

A. Soft maples.

Q. You are talking about the trees that are down?

A. The trees that are down. They were cut from this stump right here. They were lying there. I don't know why they reached so high to cut that one because he could have got a couple more logs out of it. Maybe he's going to do that yet.

THE COURT: The trees that you see in the background of that are where?

THE WITNESS: They're farther over toward River Road.

Q. (By Mr. Dank, continuing): Do you know what kind of trees they were?

A. These are soft maples.

Q. I am talking about the ones in the background.

A. I would say those are poplar.

Q. Poplar?

A. Poplar.

Q. Okay.

January 21, 1977, morning session,
Testimony of Fitz Bridges

Q. Thank you. Mr. Bridges, we've been using Exhibits 37 throughout this hearing, I wonder if you would just briefly tell us what that exhibit is?

A. It's—this one over here on the blackboard? I mentioned previously in my summary, I was the township engineer from '60 thru '68, and worked with the Milliken laymen and I obtained—various maps to use in our programming and design of lateral and trunk systems first, and preliminary design of the lateral system. This is what they have indicated as their existing land use map. It shows different types of usage and ledging down below. Shows where existing homes were as of that date, time. This was produced in '67 when I got it. I've indicated on this map in red outlining the area flown by, Riverside Bayview Homes Incorporated, 20 acres, plus lots in the subdivision. Then I've indicated in an orange color here, lands that are made lands. This information is from personal knowledge, but these actually, lines were taken from Macomb County Soil Book. I don't know whether that's been—

THE COURT: That's all right. You have personal knowledge and the book was published by Macomb County.

A. Department of Agriculture and that's indicates—

Q. Exhibit 28—

A. That indicates the various types of soil in the county and by aerial photographs and it also indicated in this particular area. I've also made a composite photograph of it, the land with MD on it, which indicated made land, and I know that this was dredged and filled to elevation 580, at the time they were filling the Metropolitan Beach. We were instrumental, we developed this piece of land right here, and filled that. This land was filled in 1925, 26. My clients filled this land. I designed by the subdivision up here, back in the 1917's, 1918, when Selfridge field was under construction. This area was filled, and there's been other areas filled since Selfridge was expanded. Selfridge is diked all the way around. There's a dike all the way around Selfridge, so even though there

may be high water, they can pump water out of it. All this land is indicated as made land. Mr. Schley indicated he lived on Pallot Street. I didn't continue on down there. We're pretty much surrounded by made land in here. This is a marina in here. Land surrounding is made, filled land.

Q. All right. Mr. Bridges—

THE COURT: Can I ask you one question. Now, you were there before they built Metropolitan Beach, I take it?

A. Yes.

THE COURT: Did you look at these photographs that had two canals, it looks like?

A. 1948?

THE COURT: Well—

A. I didn't officially Macomb County until 1946.

THE COURT: I can't find the photos, just to confirm that there were canals there. I guess we agreed that they were, but—

A. I'm quite familiar with the photographs.

MR. DANK: Here's 40.

THE COURT: Give him one of the 40's.

MR. DANK: I'll give you the 40's and 37's.

THE COURT: 11-3-40. These two lines, here.

A. Let me see, now. These lines—there is a —well, peak of the canals that we're involved in, this is Jefferson—

THE COURT: Right there?

A. Yes, Metropolitan Parkway now comes a—right about in this location.

THE COURT: Across here?

A. This canal is, is about the two ten acres parcels south of our property. This canal, if I could correlate that with the other Exhibit 69. This canal is the one that you see there.

THE COURT: I understand that. I just want to know where the other two were that aren't there anymore?

A. This canal right here—these lines in here, are now in Metropolitan Beach, but I believe these lines have been added to the negatives of the photographs. These are not actually canals. I was not living in Macomb County in 1940. I was on the beach property before and during the filling, and I don't recall any canals in there.

THE COURT: Okay.

A. In 1937, the photograph without the addition of the lines, they do show a canal.

THE COURT: They must have been there.

A. Yes, but I wasn't out there in '37. I started coming to Mt. Clemens in 19—no, I don't believe I was there in '37.

THE COURT: At least not to know that?

A. No, but these I think have had some lines added to it.

January 21, 1977, afternoon session,
Testimony of Thomas P. Gough

Q. Are there other charts in this book that will enumerate the characteristics of Lamson type soils?

A. Yes, there are.

Q. Can you tell us what pages those charts appear on?

A. I refer to Table 2, which deals with agriculture.

THE COURT: What page are you on?

THE WITNESS: This will be on Page 59. This is the predicted average yields per acre of crops. Now, on that if you go down to Lamson fine sandy loam, it will indicate two levels of management of the soil, what they call management A and B. A was without any special practices being applied, and the B table refers to a better job of conservation.

For instance, on Lamson you would install artificial drainage. You'll see that in Lamson it would produce 45 bushels of corn and corn for drain in its natural condition, and if it were improved by drainage, you would go up as high as 95 bushels, and you go across the page showing the same thing for the main crops that are raised in Macomb County. This would be in reference to what I was talking about that there are Lamson soils out in other parts of the county. Then there's another table dealing with—

Q. Let me just stop you for a moment and let me ask you this: In comparison to other soils that are found in Macomb County, do you find the Lamson types to be ordinarily high yield type soils?

A. No, they're not the highest. They would be about medium compared to the other soils. The very droughty, dry soils in the sand ridge over on the west side of the county would have low production, and the better lake bed soils like Conover and Parkhill soils up in the Richmond area, up in the northeast end of the county would be the highest production. So the Lamson soils would fit in about medium in production, along with some of the other similar soils, Metea, Granby and a few others.

Q. Thank you. Are there other charts?

A. Another table would be Table 3 dealing with wildlife.

THE COURT: What page?

THE WITNESS: The page on that would be Page 66. On this table it lists the suitability for various elements of wildlife habitat and the kind of wildlife that you would expect on this kind of a soil. As you read across the Lamson you'd find it's listed—now, this is under natural conditions, not artificially drained, just natural conditions. It would be poorly suited for grain and seed crops, but it would be suited for grasses, wild herbaceous upland plants, hardwoods, conifers, wetland food and cover. It would be well suited there. It would be well suited for shallow water developments, excavated pines and then openland wild fields and woodland and wetland wildlife. It would be suitable for all of them.

Q. Would this be true whether or not it was located within the near proximity to a navigable water?

A. Yes, it would.

Q. For instance?

A. This would be true of the soil where you found it in Macomb County.

Q. For instance, that is up in Shelby Township?

A. Section 6 of Shelby Township, yes, just south of 26 Mile Road.

Q. That's on the west side of the county?

A. Yes, the west side. It's a half mile from the west county border, next to Oakland County.

Q. All right.

A. There is another table, too, if you want to go a little further in engineering. There's another table on Page 86 or 84 that tells you the suitability of this soil for various uses and some soil features affecting this use. For instance, its suitability for topsoil, a source of topsoil would be pretty good, but it's not suitable for sand or gravel, and it would be poor material for a road fill. It would be fair for impermeable material for building a dike or a dam, and

then the features affecting it, the high water table would affect the use for highway or for foundation for a low building or for winter grading. This would be strictly because of the high water table.

In other words, these are limitations so that any use that would be made of this soil should take these things into consideration. There are limitations, but there are methods of overcoming these bad capabilities, if you will.